

mandatory release or parole and revoked five times. During each release period, he committed administrative violations primarily consisting of drug use, missing some drug treatment sessions, and/or missing some sex offender treatment sessions. His most recent revocation occurred in 2006, and he had just completed service of his remaining prison time on November 2, 2006, but was not released from custody so that the government could file a petition to civilly commit him under Title 18, United States Code, Section 4248, on November 3, 2006.

3. Significantly, Mr. Dowell has not been charged with any crime since the 1984 child molestation crimes. During the five parole release periods, which amounted to approximately 44 months between 1998 and 2006, he was not arrested for anything other than administrative violations.

Dr. Demby's Qualifications, Diagnoses, and Opinions

4. At the evidentiary hearing held January 3-4, 2008, the government presented Dr. Lela Demby, Ph.D., a career employee of the Bureau of Prisons (BOP), as its first witness. Dr. Demby is the sole Sex Offender Forensic Psychologist at FMC Butner (Butner), which the BOP has designated as a center for the evaluation and treatment of sex offenders. Dr. Demby began evaluating adult sex offenders in 2003 when she was hired as a staff psychologist at Butner. In her current position, which was created in 2006, she conducts evaluations only and is not involved in the treatment of sex offenders. Her *curriculum vitae* reflects training specifically directed to sex offender evaluations and civil

commitments during her tenure with BOP. *See Pet. Exh. 7.* Dr. Demby engages in no private practice and works exclusively for the government/prosecution. At the time she conducted her evaluation of Mr. Dowell in early 2007, she had been a fully licensed psychologist for four years. His was her first Section 4248 civil commitment evaluation, and since then she has personally conducted eleven (recommending commitment in all but one), and has consulted on others for a total of approximately forty.

5. As part of her evaluation of Mr. Dowell, Dr. Demby reviewed a large quantity of materials, including his BOP central file, U.S. Parole Commission file, and available police reports. She also met with Mr. Dowell five times, spending between four and four-and-a-half hours interviewing him. Based on the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM) classification system, Dr. Demby determined Mr. Dowell warranted the following diagnoses: Pedophilia, Sexually Attracted to Females, Nonexclusive Type; Exhibitionism; several substance abuse disorders; and Antisocial Personality Disorder. Dr. Demby provided some explanation of the characteristics and criteria for Pedophilia, Exhibitionism, and Antisocial Personality Disorder according to the DSM. In arriving at her diagnoses of Pedophilia and Exhibitionism, she relied on Mr. Dowell's history of sexual-related convictions, noting that his behavior spanned about three years, from July 1981 to at least July 1984. Dr. Demby admitted there is no evidence from any source that Mr. Dowell had serious difficulty refraining from sexually violent conduct or child molestation during any of the five periods of parole release between 1998 and 2006.

She further admitted that pedophilic and exhibitionistic behaviors tend to diminish with age, and she acknowledged that some pedophiles are “non-practicing.” Nonetheless, she described Mr. Dowell’s paraphilias as “chronic” and “lifelong” because, according to her, the DSM defines them that way. Dr. Demby opined that Mr. Dowell currently suffers from a disorder meeting the criteria for civil commitment under Section 4248.

Dr. Kishur’s Qualifications, Diagnoses and Opinions

6. Dr. Richard Kishur, Ph.D., was retained by Respondent’s counsel to evaluate Mr. Dowell and was called to testify in Mr. Dowell’s case-in-chief. Dr. Kishur has worked with sex offenders since 1984. From 1989 to 1993 he was employed by the Oklahoma Department of Corrections as the Clinical Director for its residential sex offender treatment program, which he developed and designed to meet the standards of the Association for the Treatment of Sexual Abusers. Since 1992 he has been in private practice and dedicates approximately 75% of his time to the evaluation and treatment of sex offenders. He utilizes a variety of assessment tools which he is licensed or certified by their authors to administer. Dr. Kishur consulted in the State of Florida regarding its Sexually Dangerous Person civil commitment treatment program, and in that capacity reviewed thirty to fifty “sexually dangerous person” evaluations. He has made presentations to legal, medical, professional and student groups regarding sex offenders, and has testified in state and federal courts regarding numerous issues related to sex offenders, including current mental illness and amenability to treatment. *See Resp. Exh. 1-b.*

7. Dr. Kishur testified in accordance with his report and findings. *See Resp. Exh.*

1. In evaluating Mr. Dowell, he reviewed the same records which were reviewed by Dr. Demby. He reviewed and reanalyzed Dr. Demby's raw data for tests and actuarial risk assessments. He spent approximately four-and-a-half to five hours with Mr. Dowell on two visits at the Grady County Jail. In addition, Dr. Kishur administered an objective measure designed to assess whether Mr. Dowell currently has any deviant sexual arousal pattern.

8. As discussed further *infra*, Dr. Kishur essentially agreed with Dr. Demby regarding her findings on the MMPI-2, her scores on the actuarial instruments, and her diagnoses of Antisocial Personality Disorder and substance abuse disorders. However, he disagreed with Dr. Demby's diagnoses of active Pedophilia and Exhibitionism, explaining that these must be qualified "by history" due to their remoteness in time, no pattern of ingrained sexual behavior, no evidence of recent or current manifestation of sexual misbehavior, and no evidence of a current deviant sexual arousal pattern. Dr. Kishur explained pedophilia is not necessarily life-long and chronic: while "fixated" pedophilia appears to have such a chronic course, mental health practitioners for years have recognized "situational" pedophilia which is transitory and less likely to result in reoffense. Moreover, the fact that the DSM states "the course [of pedophilia] is usually chronic, especially in those attracted to males," *DSM, Section 302.2 at 571*, necessarily implies that it is not chronic in every case. Dr. Kishur observed in Mr. Dowell's record that during the period of his sex-related crimes, he was engaging in a great deal of promiscuous behavior, gaining as much

sexual contact as possible. Based on the records as well as evaluation, Mr. Dowell lacks the characteristics of a “sexual predator” or “sadistic psychopath.” In Dr. Kishur’s clinical opinion, Mr. Dowell is not a person who is likely to engage in sexually violent conduct or child molestation. Thus, Mr. Dowell does not meet the criteria for commitment under Section 4248, because not only does Mr. Dowell not presently suffer from a qualifying disorder, there is no evidence he has serious difficulty refraining from sexually violent behavior or child molestation as a result of any such disorder.

Personality Assessment Tools

9. Dr. Demby utilized five assessment tools in the evaluation process. Dr. Demby administered and/or scored these originally, and Dr. Kishur reviewed her results. Two of these tools, the Minnesota Multiphasic Personality Inventory, Second Edition (MMPI-2), and the Hare Psychopathy Checklist-Revised (PCL-R), do not assess for risk of recidivism and are not directed to sexual offenders. The doctors’ interpretations of the MMPI-2 results are set out in detail in their reports, *see Pet. Exh. 2 at 12-13, and Resp. Exhibit 1 at 9*, and are largely consistent regarding Mr. Dowell’s personality profile.

10. On the Hare PCL-R, Dr. Demby rated Mr. Dowell with a score of 30, which is the “cut-off” for psychopathy. *Pet. Exh. 6*. Dr. Kishur, also qualified to administer the Hare PCL-R, initially scored Mr. Dowell as 16, and during testimony reevaluated one item which changed the score to 17. *See Resp. Exh. 2*. Dr. Kishur testified there are any number of factors that could account for the differing results, such as the fact that he relied less on

structured interview than did Dr. Demby, or environmental factors affecting the way Mr. Dowell presented himself, such as location of the evaluation (formal prison versus more laid-back county jail), agenda of the evaluator (Dr. Demby represents the government), or gender of the evaluator. It is noteworthy that neither evaluator attributed points for Item 14 “impulsivity.” Additionally, Dr. Kishur noted the margin of error or confidence interval with the Hare PCL-R is 8 points; thus, the scores potentially overlap at 23-25 points, below the level for psychopathy. Noting that psychopathy entails an enjoyment in inflicting harm, Dr. Kishur found no support for this in Mr. Dowell’s history or evaluation.

11. Upon reviewing Mr. Dowell’s history, and supported by the results of the MMPI-2 and the Hare PCL-R, Dr. Demby diagnosed Mr. Dowell with Antisocial Personality Disorder. Dr. Kishur concurred in this diagnosis. In a nutshell, Antisocial Personality Disorder describes the way a person interacts with the world and typically manifests as a disregard for laws, social expectations, and the safety and rights of others. Dr. Demby estimated that eighty to ninety percent of prison inmates warrant a diagnosis of Antisocial Personality Disorder. Thus, there is a high correlation between Antisocial Personality Disorder and general criminality. Antisocial Personality Disorder is potentially an important factor here if a causal connection between the disorder and “serious difficulty” controlling sexual behavior can be established. Dr. Kishur did not find this nexus present in Mr. Dowell’s case. Furthermore, the “acting out” behavior often associated with Antisocial Personality Disorder (such as criminal activity) tends to diminish with age; Dr. Demby

placed this at age sixty, while the DSM indicates remission may be observed starting in the forties. *Court Exh. 5 (DSM) at 704*. Mr. Dowell is now 53 years old. Dr. Demby admitted that a diagnosis of Antisocial Personality Disorder alone is not sufficient to meet the standard required for commitment under Section 4248.

Risk Assessment Tools

12. The other three assessment tools applied by Dr. Demby are actuarial instruments: the Static-99, the Rapid Risk Assessment for Sex Offense Recidivism (RRASOR), and the Minnesota Screening Tool for Sex Offenders - Revised (MnSOST-R). These were designed to conduct risk assessments for sex offense recidivism based on “risk factors” that have been associated with recidivism in targeted sample pools of other offenders. They compile data on released sex offenders and identify certain characteristics (risk factors) in order to show what people with those characteristics did over the course of time. The risk factors correlate with recidivism in the sample pools, but do not actually predict whether a specific individual – in this case, Carl Dowell – will reoffend sexually. Most of these factors are static, i.e., they cannot change, such as whether a victim was a stranger or an acquaintance. The MnSOST-R contains four dynamic, i.e., potentially changeable, factors, such as whether the offender has completed a course of treatment.

13. On the Static-99, scores range from zero to twelve. Scores at six and above are considered to be in the high range of risk of recidivism. Mr. Dowell scored an eight, which Dr. Demby testified is associated with a 57% rate of sexual reoffending within fifteen years

after release from custody. An itemized review of the scoring rules revealed that five of the eight points were due solely to his 1982 convictions relating to exhibitionistic, non-contact conduct in Germany. *See Court Exh. 1.*

14. On the RRASOR, which looks at only four variables, Mr. Dowell scored four out of a possible six points. This correlates to a 48.6% rate of reoffending within ten years of release. The “confidence interval” or margin of error for this is ± 8.3 points, which means it may indicate a risk as high as 56.9%, or as low as 40.3%.

15. On the MnSOST-R, Mr. Dowell scored 15 on a scale of -16 to +31 points. In the sample pool utilizing a 15% base rate, this score correlated to a 70% recidivism rate. The margin of error for this is 18%, resulting in a range of 52% to 88%. However, as with the Static-99, an itemized review of the coding rules demonstrated a disproportionate number of points (8 of 15) are obtained strictly from the circumstances of his convictions for the exhibitionistic conduct in Germany. The commentaries to the coding rules are enlightening. The commentary to Item 9, for example, exclusively relates concern where the offender has “a history of attacking strangers.” *See Court Exh. 4.* There is no evidence Mr. Dowell ever sexually attacked a stranger.

16. As useful as they appear for information purposes, the actuarials have a laundry list of shortcomings. For example, even Dr. Demby agreed they do not account for individual characteristics, especially in the case of the Static-99 and the RRASOR which are comprised solely of static factors. They do not account for development in the offender’s

history. They do not account for changes in the offender's perspective and acceptance of responsibility. They do not account for the length of time between the offense conduct and release from custody. They do not account for an offender's current age beyond 25 or 30. They do not define "reoffend" consistently, which can be either rearrest, reconviction, or reincarceration. Even when dynamic factors are included, as in the MnSOST-R, these may not receive sufficient weight. For example, MnSOST-R Item #15 shows that had Mr. Dowell successfully completed a sex offender treatment program, his score would have been reduced by only one point, leaving him still in the "high risk" range.

17. Another shortcoming occurs in the way the results are presented. Studies indicate that different types of sex offenders reoffend at different rates. Incest offenders have the lowest rate of recidivism, extrafamilial child molesters and rapists reoffend at higher rates, and exhibitionists have the highest rate. Unfortunately, the sample pools forming the "base rates" mix offenders and offenses. The actuarial scores and risk percentages do not break down which offenders in the pool subsequently reoffended and in what way, thus it is impossible to determine in any meaningful way, if, when, or in what way Mr. Dowell is supposedly at risk for reoffending. His exhibitionism convictions account for a large number of points in the actuarials, and yet this does not constitute the potential conduct to which Section 4248 is directed.

18. Dr. Kishur described yet another problem with actuarials, which lies in the fact that any given variable in effect "holds a place" for some other variable that is not understood

or described, thus calling into question its particular relevancy in a given case.

19. Dr. Kishur did not dispute the scores obtained by Dr. Demby on the actuarials, as they appeared to be calculated in accordance with the coding rules of the various instruments. He testified that although actuarials tend to be better than pure clinical judgment in predicting reoffense, they still fall short of reliable accuracy. Moreover, in Dr. Kishur's opinion Carl Dowell "falls outside" the actuarials, due primarily to the fact his three sex-related convictions involved three distinct types of sexual misconduct (exhibitionism, incest child molestation, and extrafamilial child molestation), each of which has distinct rates of recidivistic tendencies which are undifferentiated in the actuarial tables. Dr. Kishur also emphasized the twenty-three years that have elapsed between Mr. Dowell's offenses and the present, and the heavy impact of the 1982 convictions for exhibitionism.

Objective Testing for Deviant Sexual Interest

20. Deviant sexual interest is the strongest predictor of sex offense recidivism. The mental health field utilizes two instruments which are designed to determine whether an individual has a deviant sexual arousal pattern: the Penile Plethysmograph (PPG) and the Abel Assessment for Sexual Interest (AASI). Dr. Demby is neither trained in, nor qualified to administer, either the PPG or the AASI. PPG is available at Butner, however Dr. Demby did not utilize it or attempt to utilize it as part of her evaluation of Mr. Dowell to determine if he in fact has any deviant sexual interest currently. She testified Butner uses PPG only as a part of treatment. In her opinion, PPG was unnecessary in this case because the question

of whether Mr. Dowell suffers from a paraphilia was “already an answered question” based on his crimes in 1981-1984. Thus, Dr. Demby conducted no diagnostic test to determine if Mr. Dowell currently has a deviant sexual arousal pattern.

21. Dr. Kishur is certified and trained to administer PPG, and utilizes it for both evaluations and treatment. He was unable to administer it to Mr. Dowell because the system is not portable and Mr. Dowell was in custody.

22. Dr. Kishur did, however, administer the AASI to Mr. Dowell. The AASI is a two-part computerized assessment and its results are tabulated and interpreted through a proprietary process which is not available to practitioners or the public. Dr. Kishur explained how the two components of the evaluation work. Effectively, the self-report portion of the instrument has no utility in this proceeding due to its completely subjective nature. Dr. Kishur explained that Mr. Dowell’s answers on the self-report portion (some of which denied or minimized sexual conduct or attempted to paint himself in an overly favorable light) would not impact the results of the objective portion. The objective portion of the AASI, which measures physical responses to stimuli, demonstrates that Mr. Dowell has normal levels of interest in adult and adolescent (i.e., postpubescent, sexually developed) African American females, and no specific interest in grammar-school age, prepubescent children of either gender. No abnormal interest was detected, and there was no incongruity or inconsistency that would call into question the validity of the assessment. Thus, according to the AASI, Mr. Dowell does not exhibit deviant sexual arousal pattern. As for the potential

error rate, Dr. Kishur testified the AASI accurately differentiates child sex offenders about 75% of the time. In response to the government's questions about reported margins of error of 21-22% or 30%, Dr. Kishur explained that if we calculate that percentage and apply it to Mr. Dowell's "scores" (adding or subtracting, as the case may be), they would still be within normal, acceptable ranges. The possibility that Dr. Kishur's presence in the room during testing affected the results was small. Dr. Kishur testified the objective component of the AASI is comparable to the PPG in both sensitivity and specificity, and provided the Court with citations to supportive studies. Dr. Demby knew of no study detracting from the reliability of the AASI.

23. Neither the PPG nor the AASI directly addresses risk assessment in the manner of actuarials, that is, they do not compare one individual's score to the score of a group of offenders with similar characteristics who have gone on to reoffend sexually. However, the mental health field recognizes deviant sexual interest as the strongest predictor of recidivism, and in that sense, these instruments are useful in the context of determining the appropriateness of civil commitment under Section 4248.

Denial

24. According to both expert witnesses, the record shows that on some occasions Mr. Dowell denied the allegations underlying the original convictions, and on other occasions admitted to his crimes. At the hearing, Mr. Dowell was called to testify (over objection) in the government's case-in-chief. Mr. Dowell admitted his past sexual

misconduct, although he denied “penetrating” the eight-year-old child¹ and his descriptions of the child molestation incidents may have varied in minor detail with the official versions. When he testified, Mr. Dowell did express regret and pain for what he did to the two girls, concern for their well-being, and recognition of the wrongfulness of what he did. Dr. Demby’s report seems to place significance on Mr. Dowell’s history of denial and lack of demonstrated remorse. However, in their testimony, both experts agreed that denial is not a predictor of sexual offense recidivism. Thus, the Court cannot rely on Mr. Dowell’s past denials to support a finding of sexual dangerousness.

Previous Diagnoses and Treatment

25. According to Mr. Dowell’s BOP central inmate file, psychology records during his term of imprisonment do not indicate a psychologist ever diagnosed Mr. Dowell with any paraphilia. Sex offender treatment was never offered or recommended while he was incarcerated. Numerous psychologists who evaluated him at intake screenings made recommendations for substance abuse classes, anger management, and vocational activities, but never for sex offender treatment. *Resp. Exh. 5; and see Pet. Exh. 1, Volume 2, Sections 3 and 5; Volume 3, Sections 2 and 3.* The United States Parole Commission required Mr.

¹ The Court notes that Mr. Dowell’s definition of “penetration” and the statutory legal definition of “penetration” sufficient to sustain a conviction of rape may not be the same. According to the Presentence Investigation Report from this crime, contained in Petitioner’s Exhibit 1, Volume 2, Section 2, the child said the act “hurt” and described seeing semen on herself and the bedcover; the medical exam was “inconclusive” which implies there were no physical findings of penetration.

Dowell to undergo sex offender treatment at the direction of his supervising officer as a condition of his release. *Pet. Exh. 1, Volume 2, Sections 2 and 5, Volume 3, Section 2.* According to testimony, Mr. Dowell attended the majority of sessions but missed some and did not complete a treatment program.

Institutional Conduct

26. Dr. Demby testified Mr. Dowell had a “very good” institutional record. He had only two disciplinary actions, one in 1993 for possessing cash which was considered contraband, and one in 2001 for a fight with another inmate. Neither of these appears to be sexually related. Work evaluations, progress review reports, and letters contained in the BOP central file indicate Mr. Dowell consistently received positive reviews, mostly ranging from “good” to “outstanding.” *See Pet. Exh. 1, Volume 2, Section 4, and Volume 3, Sections 4 and 5.* Mr. Dowell did not engage in new sex offenses while in prison. Although Drs. Demby and Kishur disagreed about the prevalence of exhibitionism in prison, Dr. Kishur, with his experience, found it significant that Mr. Dowell did not engage in exhibitionism while in prison.

Drug Use

27. Dr. Demby was concerned by Mr. Dowell’s repeated drug use during his terms of parole and mandatory release: knowing that drug use was prohibited by his release conditions, and knowing he would be tested for drug use, he went ahead and used drugs. In fact, in her words, he “has continued to do whatever he wanted” during his parole releases.

Mr. Dowell's choice to use drugs at various times during his five parole releases is troubling insofar as it suggests he may again use drugs upon his release from custody. However, that conduct, while perhaps relevant at some level, does not come close to suggesting Mr. Dowell is likely to engage in proscribed sexual conduct. The possibility of a nexus between Mr. Dowell's drug use in the early 1980s and the incidents of child molestation is tenuous at best. Dr. Kishur opined Mr. Dowell's exhibitionistic conduct was likely driven by drug use (due to its bizarre circumstances), but exhibitionistic conduct is not "sexually violent conduct or child molestation." In the absence of evidence of inappropriate sexual behavior during the 44 months of parole release since 1998, the evidence fails to show a causal connection between drug use and proscribed sexual conduct as contemplated by Section 4248. Further, if, as Dr. Demby suggests, Mr. Dowell was doing whatever he wants, there is absolutely no indication he wanted to commit sexually violent conduct or child molestation.

Mr. Dowell's Family

28. Following his release from custody in 1998, Mr. Dowell married the woman he had known since 1994, Lee. Lee Dowell and her daughter, Laquita Arnold, both testified in support of Mr. Dowell via video from the U.S. Attorney's Office in Memphis, Tennessee. They, along with Ms. Arnold's two daughters who were 5 and 9 years old in 1998, were aware of Mr. Dowell's convictions for child molestation. from the start This was a particularly sensitive issue for them, as Ms. Arnold herself had been molested as a child and was determined that her daughters not suffer the same fate. Ms. Arnold testified to her

daughters' understanding of inappropriate touching and molestation and to their ability to speak up about such issues. She and Ms. Dowell both expressed full confidence that Mr. Dowell had not committed or attempted to commit any inappropriate act with either child. The children have enjoyed a happy, caring relationship with their step-grandfather. Ms. Dowell and Ms. Arnold assured the Court they observed nothing inappropriate in the way Mr. Dowell has treated the girls over the years, and the girls' attitude toward him never changed or gave cause for suspicion.

Sex Offender Registration

29. Upon his release from federal custody in April 2006, Mr. Dowell registered as a sex offender in his home state of Mississippi, as required by state law. *Resp. Exh. 3*. In the future, upon his release from custody, whether first civilly committed or not, Mr. Dowell will be subject to continuing sex offender registration requirements under both state and federal laws, which require renewal every 90 days. If he fails to comply with registration laws he will be subject to criminal prosecution and incarceration. *See Resp. Exh. 4; 18 U.S.C. §2250; 42 U.S.C. §§16901 et seq.*

Statistics Regarding Recidivism

30. Not all sexual offenders are sexually dangerous persons, and not all sex offenders commit new sex offenses when they are released from custody. According to the broad Bureau of Justice Study, "Recidivism of Sex Offenders Released from Prison in 1994," only 5.3% of the nearly 10,000 male sex offenders in the study were rearrested for new sex

crimes within three years of release from custody. *Court Exh. 2 at 24*. Of the child molesters in the study, 3.5% (150 men) were convicted for a new sex crime against a child or an adult. *Id.* Breaking this down further, the study showed that of the men who were imprisoned for molesting a child age 13 or younger and were released in 1994, only 2.8% were subsequently arrested for molesting another child. *Id. at 33*. Among child molesters, the first year following release from custody was the period when the largest number were rearrested. *Id. at 25*.

Proposed Conclusions of Law

1. Title 18, United States Code, Section 4248, authorizes the Attorney General or his designee to certify a person who falls into one of three categories as a “sexually dangerous person.” Having so certified Mr Dowell, the government proceeds against him as a person “who is in the custody of the Bureau of Prisons,” asking this Court to commit him to indefinite confinement and/or supervision following the service of his criminal sentence which expired December 16, 2006, pursuant Title 18, United States Code, Section 4248. *Doc. 1*.

2. To prove a person is a “sexually dangerous person,” the government must prove three elements: (1) that Mr. Dowell “has engaged or attempted to engage in sexually violent conduct or child molestation”; (2) that Mr. Dowell “suffers from a serious mental illness, abnormality, or disorder”; and (3) that as a result of such disorder, Mr. Dowell “would have serious difficulty in refraining from sexually violent conduct or child molestation if

released.” 18 U.S.C. §4247(a)(5) and (6). Thus, the court must consider evidence relating to both past conduct and current status.

3. The government bears the burden of proving that Mr. Dowell is a “sexually dangerous person” by clear and convincing evidence. 18 U.S.C. §4247(d).

4. The Tenth Circuit offers no pattern jury instruction defining “clear and convincing.” This standard of proof has been defined in a general model instruction as “evidence that produces in your mind a firm belief or conviction as to the matter at issue.” O’Malley, Grenig & Lee, *Federal Jury Practice and Instructions - Civil*, §104.02 (5th ed. 2000). This language is also used in the pattern instructions of the Third and Fifth Circuits. *See* Third Circuit Model Civil Jury Instructions, Instruction No. 1.11 (2006) *and* Fifth Circuit Pattern Jury Instructions (Civil Cases), Instruction No. 2.14 (2006). Two circuits define clear and convincing in terms of “highly probable.” *See* Federal Civil Jury Instructions of the Seventh Circuit, Instruction No. 1.28 (2005), *and* Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit, Instruction No. 1.4 (2007).

5. The Court finds the government has met its burden with respect to the first element, due to Mr. Dowell’s convictions in two child molestation cases.

6. Having reviewed the doctors’ reports and other exhibits presented at the evidentiary hearing and considered the testimony of the witnesses, however, this Court concludes that the government’s evidence fails to show clearly and convincingly that Mr. Dowell currently suffers from a serious mental disorder that would cause him serious

difficulty in refraining from either violent sexual conduct or child molestation if released. Mr. Dowell has no history of sexually violent conduct; his offenses of primary concern to the Court relate to the incidents of child molestation which occurred in 1984. Since 1984, there is no evidence that Mr. Dowell has experienced sexually deviant interest. Since 1984, there is no evidence that Mr. Dowell has engaged in inappropriate actions related to sexually violent conduct or child molestation. The only objective test administered to Mr. Dowell reveals no current sexually deviant arousal pattern. The actuarial measurements applied to Mr. Dowell's case suggest a risk of reoffense in the neighborhood of 50% when margins of error are accounted for, yet they fail to take into account numerous, relevant, individual characteristics of this case and place undue emphasis on the 1982 exhibitionism case which did not involve physical contact, sexually violent conduct, or child molestation. Thus, the Court finds the evidence does not support a finding of the active presence of a relevant serious mental disorder at this time, and further, that the evidence fails to prove to a clear and convincing level that Mr. Dowell's historical conditions, diagnosed as Pedophilia (by history) and Exhibitionism (by history), would cause him serious difficulty in refraining from sexually violent conduct or child molestation if he is released at this time.

Respectfully submitted,

s/ Julia C. Summers

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to Assistant United States Attorney H. Lee Schmidt.

s/ Julia C. Summers

JULIA C. SUMMERS